No. 84-1660

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Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

JACK K. MOORE,

Petitioner,

v.

CITY OF CHARLOTTE, etc., *et al.*

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITIONER'S REPLY BRIEF

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On Petition For Writ Of Certiorari To
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For The Fourth Circuit

PETITIONER'S REPLY BRIEF

The question presented by this case is not, as respondent suggests, whether a Court of Appeals, applying the standard announced in Anderson v. Citv of Bessemer City, might have ruled for respondent. The Court of Appeals, writing in January

1985 prior to the decision in Anderson, did not and could not have applied the Anderson standard, but was necessarily utilizing the Fourth Circuit approach criticized in Anderson itself. The issue here is whether, by vacating and remanding its pre-Anderson decision, this Court will afford petitioner an opportunity to have his claim decided by an appellate court clearly applying the correct legal standard.

Simple fairness dictates that petitioner be afforded such a hearing. In Memphis Firefighters v. Stotts, 81 L.E.2d 483 (1984), the mere possibility that a few white firefighters might some day be temporarily laid off due to lost seniority led this Court to entertain and decide Title VII issues of considerable difficulty. In the instant case the injury to petitioner is not a matter of speculation;

he was suspended for longer than any of the whites in Stotts, and has in fact, been permanently demoted. If petitioner's Title VII claims are to be rejected, that should be only after those claims have been weighed by the correct legal standards, not because petitioner had the ill fortune to have his case decided 50 days prior to, rather than, 50 days after the decision in Anderson.

A remand is particularly appropriate because respondent quite deliberately declined to defend or even refer to the mistaken factual theory on which the Fourth Circuit decision was based. As we noted in our petition the Court of Appeals grounded its analysis on a factual theory neither advanced by respondent nor presented to the trial court -- that the gravity of an alleged infraction was to be measured by the section of the City

regulation invoked, not by the actual substance of the purported misconduct. Since no witness ever articulated at trial any such explanation for the suspension and demotion of petitioner, respondents properly declines to argue that the treatment of petitioner could be upheld on the Court of Appeals' theory. The factual contentions pressed in this Court by respondent clearly warrant consideration on remand, but they simply are not the basis on which the Court of Appeals acted.

Respondent insists that even under the standards announced in Anderson the district court committed clear error. We do not ask this Court to resolve that question, or to reject on the merits the respondent's contentions. We ask only that this Court remand this case to the Fourth Circuit and thus afford to both petitioner and respondent an opportunity

to present their arguments regarding the applicability of Anderson to the particular circumstances of this case.

CONCLUSION

For the above reason the Court should grant the petition, vacate the decision of the court of appeals, and remand the case for further consideration in light of Anderson v. City of Bessemer City.

Respectfully submitted,

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